Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

ROBERT T. HANSEN and MARLA DES ERMIA,

Petitioners,

v.

AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of California, County Of Los Angeles

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QUESTIONS PRESENTED

Are there any circumstances in which an employee of a labor union can prosecute an action for wrongful termination in violation of public policy under state law which is not preempted under federal labor law? In the case of Plaintiff Hansen, may an elected union official who is discharged by the union for exposing union corruption to the union membership prosecute a state action for wrongful discharge in violation of public policy, or does the policy of promoting union democracy as set forth in *Finnegan v. Leu*, 456 U.S. 431, 103 S. Ct. 1867, 72 L. Ed. 2d 239 (1982) preempt such a claim under federal law? In the case of Plaintiff Des Ermia, may an employee of a labor union who is employed pursuant to a collective bargaining agreement and who is discharged by the union in retaliation for blowing the whistle on union officials' theft of union funds prosecute a state action for wrongful discharge in violation of public policy, or is such an action preempted by federal labor law because of the need for uniformity in interpreting collective bargaining agreements?

LIST OF PARTIES

The Petitioners are Robert T. Hansen and Marla Des Ermia.

The Respondent is Aerospace Defense Related Industry District 725 of the International Association of Machinists and aerospace Workers.

Calvin Duncan, Barbara Powley and Does 1-100, inclusive, were dismissed from the case.

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OPINIONS AND ORDERS BELOW

The jury verdicts and judgments thereon in the trial court are set forth at Appendix 13-22. The Court of Appeal decision is reported at 90 Cal. App. 4th 977, 109 C.R. 2d 667 and is set forth in the Appendix 1. The denial of review by the California Supreme Court is set forth in Appendix 23.

JURISDICTION

This Court's jurisdiction is based on section 1257(3) of the Judicial Code (28 U.S.C. § 1257(3)) and Rule 10(c) of the Rules of the United States Supreme Court. It involves an important question of federal law that has not been decided by this Court and a decision by a State Court which is inconsistent with the principles previously articulated by this Court. The Court of Appeals of the State of California reversed a jury verdict in favor of Plaintiffs in this case on the basis that the Plaintiffs' causes of action were preempted by the Labor Management and Reporting Act set forth at 29 U.S.C. § 401 et seq. and section 301 of the Labor Management Relations Act, set forth at 29 U.S.C. § 185.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes involved are sections 185, 401 and 524 of Title 29 of the United States Code. These are set out at Appendix 24.

STATEMENT OF THE CASE

The International Association of Machinists and Aerospace Workers is one of the largest labor unions in the country. It consists of several divisions. There is an International. Below the International are subordinate units which are called districts. The districts are made up of a number of local lodges. (R.T. p. 604)

The plaintiffs in this case were long-time employees of the Machinist Union. Hansen was an elected business agent of District 720, whose term of office was four years. Des Ermia was an elected treasurer of District 727. In the early nineties the machinists union began to experience a reduction in its membership that paralleled the reduction in the aerospace industry. This reduction led to a reorganization of some of the districts and locals under the auspices of the International. In January of 1994 the defendant in this case, District 725 was created. It was made up of a number of other districts in the southern California area. Among those districts which became a part of District 725 was District 720 and District 727. (R.T. p. 606)

When the districts which employed the plaintiffs herein were merged into District 725 the plaintiffs' employment was transferred to the new district. Plaintiff Hansen continued to function as an elected business agent. It was defendant's contention at the trial that at this point Hansen was an appointed business agent. Hansen contended that he was elected to a four-year term by the membership and continued in that capacity. (R.T. pp. 1290-1294, 613.) Des Ermia's position as an elected secretary-treasurer was eliminated. She was employed in

the new district as a clerical worker, and her new employment was subject to a collective bargaining agreement. (The Machinist Union had a collective bargaining agreement with the Office Workers Union that covered its clerical employees.) There was no break in Des Ermia's employment. (R.T. pp. 616, 617)

Calvin Duncan became the president and directing business agent of the new District 725 by means of a new method of selecting presidents. He was elected by delegates who had been selected by the local lodges. He was not elected by a vote of the membership. Previously the district presidents had been directly elected by the union membership. (R.T. p. 606)

Duncan terminated Hansen's employment effective May 31, 1996. He terminated Des Ermia's employment effective January 1, 1997. Duncan's stated reasons for terminating Hansen were his poor performance as a business agent and his insubordination which was, in effect, undermining Duncan's authority in his management of District 725. He also stated Hansen's termination was for seconding a motion before the delegate body to have business agents elected instead of appointed.

Duncan's stated reason for terminating Des Ermia was that she was being laid off for lack of work. In the case of each of the plaintiffs, the jury unanimously found these reasons to be false and pretextual and adopted the plaintiffs' theory of the reasons for their termination. (R.T. pp. 513-515, 520-522)

Each of the plaintiffs presented evidence from which it could be reasonably inferred that they were terminated because they were exposing corruption and thievery on

the part of their superiors and when warned about reporting such conduct refused to remain silent and participate in a cover up. The methods by which they exposed this corruption were different.

Des Ermia discovered that her supervisor, Barbara Powley, was using the union credit card to make personal purchases. She was purchasing such items as horse feed and clothing and charging them to the union. Des Ermia discovered five separate transactions involving personal expenditures with union funds. (R.T. pp. 628, 634) The supervisor was also converting monies from the union's petty cash fund. (R.T. p. 642)

When Des Ermia discovered this misuse of union funds, she reported what she found to an auditor with the International. (R.T. pp. 630-640) This precipitated an investigation which in retrospect appeared to be part of the cover up. The investigation was conducted by an auditor from the International named Jay Borman. His investigation was limited to inquiring of the suspected thief if she had an explanation for her conduct. She claimed everything was an innocent mistake and her explanation was accepted. The auditor never questioned Des Ermia concerning the misappropriation of union funds, nor apparently anyone else. Nor did he attempt to determine whether or not other credit card charges made by the supervisor Powley were legitimate. (R.T. pp. 651 and 2163, 2174)

The evidence established that after making this report Des Ermia was subjected to a course of conduct that was calculated to make her resign. She was subjected to numerous forms of harassment which included, among

other things, falsely accusing her of misconduct in her job performance. Her employment benefits, such as sick leave and vacation time, were taken away from her and later returned. She was subjected to extreme criticism and ordered to engage in physical labor that was calculated to and did, in fact, cause her physical injuries. (R.T. pp. 657, 684-687) When this tactic failed, she was terminated. The stated reason for her termination was she was laid off for lack of work. However, Des Ermia offered evidence that there was an abundance of clerical work that remained even several years after her termination. This was true irrespective of the issue of seniority rights. There was a backlog of work that would require at least five of six months work when she was purportedly terminated for lack of work. (R.T. p. 920)

Hansen's method of exposing corruption within the union was different. He spoke out to the membership about the thefts revealed by Des Ermia and the fact that his superiors condoned such conduct. He also spoke to the membership concerning the handling of large amounts of money by Duncan. At the time the new district was created each of the old districts controlled real estate and money belonging to the district through what were known as building corps. The money and real estate from these entities were supposed to be transferred to the new district. Although Duncan had publicly stated that he had transferred such funds from the old District 720, Hansen discovered that this was not true. Approximately $90,000 in such funds were not accounted for. Hansen spoke out to the membership about Duncan's misrepresentations and his handling of these funds. (R.T. p. 1524)

Hansen's reports to the membership occurred in the following context. Hansen was an elected official of the union and felt as a result his first responsibility was to the membership. The situation he was confronted with occurred as a result of anonymous flyers that began circulating among the members which accused the union hierarchy of condoning thefts by office manager Barbara Powley and misrepresentations by president Calvin Duncan as to the handling of union funds. Members would approach him as an officer of the union with inquiries as to the validity of these charges. Hansen felt an obligation as an officer of the union to respond to these inquiries truthfully. His responses indicated that the anonymous charges being circulated in the flyers were true. (R.T. pp. 1524, 1528-1530)

Hansen spoke out to the membership in this fashion both before and after he was threatened with the loss of his job if he did so. Calvin Duncan accused him of authoring these flyers and stated that if he knew Hansen was speaking out in this fashion he would be fired. Hansen's choice was to lie to the membership, remain silent and conceal what he knew were improprieties in the handling of union funds, or to inform the membership of the true facts. He chose the latter course of action and was fired as a result. (R.T. pp. 1522-1530)

This case was tried to a jury with each plaintiff asserting a single cause of action for wrongful termination based on a violation of public policy. (Several of the original causes of action were dismissed on preemption grounds when the cases were removed to federal district court, with that Court denying such motions as to the wrongful termination in violation of public policy

claims.) Both plaintiffs asserted that they were harassed and terminated for exposing the fact that union officials were embezzling union funds and misrepresenting the status and location of other union funds entrusted to those officials. The defendant contended that one of the plaintiffs, Hansen, was terminated because of policy differences with management and poor work performance. The defendant asserted that the other plaintiff, Des Ermia, who was a clerical employee and employed pursuant to a collective bargaining agreement, was terminated for lack of work.

The jury was instructed that they should find for the defendant if the plaintiffs failed to prove that the defendant's stated reason for the terminations was false. (R.T. pp. 495, 496) The jury returned a unanimous verdict finding in the case of Hansen that his termination was not because of policy differences with his union superior. In specific interrogatories submitted to the jury they unanimously found that Hansen reported to union officials or the membership that another employee committed theft or embezzlement against the union; and that defendant's stated reason for terminating Hansen, (that is, policy differences between him and management) was not a " . . . true reason but a pretext to retaliate against Mr. Hansen for responsibly reporting that another employee committed theft or embezzlement against the union." (R.T. p. 533)

With respect to Des Ermia, the jury was instructed to find for the defendant if the plaintiff failed to prove that the defendant's stated reason for termination, that is, because of a lack of work, was false. In answers to special interrogatories submitted to the jury on Des Ermia's

claim, the jury also unanimously found that the stated reason for the termination was false and that " . . . the defendant's stated legitimate reason for terminating Marla Des Ermia's employment was not its true reason, but a pretext to retaliate against Ms. Des Ermia for responsibly reporting that another employee committed theft or embezzlement against the union."

The jury returned unanimous verdicts for each of the plaintiffs, finding that they were terminated in violation of public policy because their termination was caused by their exposure of corruption within the union. The California Court of Appeal held, at 90 Cal. App. 4th 977, 109 Cal.Rptr.2d 482 that the cause of action asserted by plaintiff Hansen was preempted by the federal labor law because to permit such a cause of action would interfere with the promotion of union democracy under the doctrine enunciated in *Finnegan v. Leu*, 456 U.S 431, 103 S. Ct. 1867, 72 L. Ed. 2d 239 (1982). The Court of Appeal further held that the cause of action asserted by plaintiff Des Ermia was preempted under the federal labor law because permitting such a cause of action under the circumstances required an interpretation of a collective bargaining agreement thereby jeopardizing uniformity in the interpretation of collective bargaining agreements. A Petition for Review was duly filed with the California Supreme Court. Review was denied by the California Supreme Court on October 31, 2001.

WHY REVIEW SHOULD BE GRANTED

State law causes of action for wrongful termination of employment in violation of public policy are well established in the law. See *Foley v. Interactive Data Corporation*, 47 Cal. 3rd 654, 254 C.R. 211 (1988). In this case the public policy being promoted is to encourage people to expose and route out corruption in labor unions. The encouragement of such conduct is forcefully expressed in the federal Labor Management and Reporting Act. Sections 401(a) 401(b) of Title 29 of the United States Code rather eloquently describe the purpose of unions and the public policy of protecting the integrity of unions. They provide as follows:

"§ 401. Congressional declaration of findings, purposes, and policy

> **(a) Standards for labor-management relations The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of**

> **their organizations, particularly as they affect labor-management relations.**
>
> **(b) Protection of rights of employees and the public The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives."**

Some of the cases have further refined the public policy set forth by these statutes. For example:

> **"Purpose of this chapter is to insure that full information concerning financial and internal administrative practices and procedures of labor organization is available to union members. *U.S. v. Goad*, 490 F.2d 1158 (C.A.8 (Mo.) 1974), cert. denied, 94 S. Ct. 3068, 417 U.S. 945, 41 L. Ed. 2d 665 (1974)."**
>
> **Purpose of this chapter is to provide guaranties of fair treatment to members of unions at the hands of those with whom they deal, including the labor organization itself. *Wirtz v. Teamsters Indus.*, 257 F.Supp. 784 (N.D. Ohio 1966).**

These statutes do not contemplate that the goals to be achieved be obtained solely by means of federal regulation. Indeed, section 524 of Title 29 of the United States Code expressly provides that these statutes are in no way designed to diminish a state's right to enforce its criminal laws, particularly such laws directed at theft and embezzlement. See also *U.S. v. Haverlick,* 195 F. Supp. 331 (N.D.N.Y. 1961), *affirmed,* 311 F.2d 229 (2d Cir. 1963), which holds that 29 U.S.C. § 501c that sets forth the penalties for embezzling union funds does not diminish or impair a state's right to enforce its criminal laws.

The decision of the Court of Appeal in this case effectively forecloses the possibility of an employee who is employed by a labor union from ever prosecuting an action against his or her employer on the basis that the termination was in violation of the public policy of the state of California. It also dramatically limits the right of any unionized employee who is employed pursuant to a collective bargaining agreement to sue for wrongful termination in violation of public policy. Based on the Court of Appeal decision if the employer asserts that there is a need to interpret the collective bargaining agreement all considerations of public policy are preempted. The Court of Appeal's opinion applies the doctrine of preemption under the Labor Management and Reporting Act in such a sweeping manner that all unionized employees in the state of California have lost important rights and protections which are available to non-union employees. It has eliminated any protection for employees of unions who attempt to expose and root out corruption in their unions. In addition to its expansion of the concept expressed in *Finnegan* the Court of Appeal stated as follows with

respect to the goal of uniformity in interpretation of collective bargaining agreements: "As far as Des Ermia, the charge was that she was laid off in retaliation for her reporting that her supervisor was misusing appellant's funds. But because appellant asserted a legitimate reason for her termination, interpretation of the CBA was required. A state's public policy, no matter how strongly reflected by its statutes, is in itself an insufficient barrier to preemption in the face of such a necessary interpretation." In other words, the Court of Appeal's ruling is if the employer asserts a legitimate reason for the termination based on the collective bargaining agreement, even if the trier of fact finds that such assertion is false, the plaintiff's cause of action is nevertheless preempted. The Court should grant review to promote the policies underlying the Labor Management and Reporting Act and to encourage and protect employees who come forward to expose corruption in labor unions.

LEGAL DISCUSSION

The Court of Appeal's holding that Hansen's claim is preempted is based on its interpretation of the holding in *Finnegan v. Leu*, 456 U.S. 431, 103 S. Ct. 1867, 72 L. Ed. 2d 239 (1982). In that case the Court held that a newly elected union president could fire an appointed business agent who had campaigned for his opponent. The Court held that the fired, appointed, business agent did not have a cause of action for violation of his rights under the LMRDA. The rationale of the court was that elected union officials were entitled to select their own appointed staff in order to carry out the policies for which they were

elected thereby promoting union democracy. The California Supreme Court expanded on this ruling, holding a state law cause of action for wrongful termination based on breach of an implied contract not to terminate without good cause was preempted for the same reason in *Screen Extra's Guild, Inc. v. Superior Court*, 51 Cal. 3rd 1017, 275 Cal. Rptr. 395 (1990).

Until the current decision, the California courts have not dealt with the issue of preemption where the fired union employee was elected and the reason for the termination was the exposure of corruption by that employee of superior officers of the union. However, this issue has been dealt with by the federal appellate courts. The most closely related case to the facts in the case of Plaintiff Hansen is the case of *Bloom v. General Truck Drivers*, 783 F.2d 1356 (9th Cir. 1986). The *Bloom* case involved a wrongful termination action wherein the discharged employee claimed he was fired for refusing to falsify minutes of a meeting. The falsification of the minutes would have had the effect of covering up improper expenditures of union funds. (One of the precise issues in this case.) The Ninth Circuit held that such state wrongful termination actions were not preempted, and that such actions implicated important state interests and had no impact on the goals of the LMRDA in promoting union democracy. Given this situation, the reasoning in *Finnegan* which was calculated to promote union democracy did not apply.

The Court of Appeal's decision in this case does not promote the goal of union democracy as expressed in the Labor Management Reporting Act and by this Court in the *Finnegan* case. It has the opposite effect. It ignores the

fact that Hansen was originally an elected official and by union fiat was turned into an at-will appointed official during the term of office for which he was elected by the union membership. The fact that Hansen was elected is of paramount importance in the context of federal labor law. This Court has so held in *Sheet Metal Workers v. Lynn*, 468 U.S. 347, 109 S. Ct. 639, 102 L. Ed. 2d 307 (1988). In this case an elected union official was terminated for expressing views related to the financial management of the local that were contrary to that of the trustee who was running the local. The local had been placed in trusteeship because of financial difficulties after the election of the business agent in question. The trustee was newly installed and had been placed there by the International. Arguably, the trusteeship created a new entity as is the contention made by the union here. However, the fact that the business agent was elected by the membership was deemed a critical fact by this Court. This, of course, is consistent with the reasoning of *Finnegan* that deemed the promotion of union democracy to be the underlying purpose of the Labor Management Reporting Act.

The Court of Appeal, in its decision in this case, held that Des Ermia's claim was preempted because it would involve an interpretation of the collective bargaining agreement. This Court has addressed the preemption doctrine as it relates to the inter-relationship between a state cause of action for wrongful termination in violation of public policy and securing uniformity under federal law in the administration of collective bargaining agreements in *Lingle v. Norge Division, Magic Chef*, 486 U.S. 399, 100 L. Ed. 2d 410, 108 S. Ct. 1877 (1988). This case did not involve an employee who was terminated for exposing

union corruption. It involved an employee whose employment was governed by a collective bargaining agreement who was terminated for allegedly filing a false worker's compensation claim. The union processed a grievance on her behalf and was successful in having her reinstated with back-pay. She then filed a tort action, which was permitted under Illinois law, for retaliatory discharge by an employer for asserting her rights under the Workers Compensation laws. The Supreme Court held that such a tort action was not preempted under section 301 of the L.M.R.A. The Court held that preemption is only appropriate where resolution of the state claim depended on interpreting the terms and conditions of the collective bargaining agreement. The reason for preemption is to avoid conflicting decisions from the various state courts in interpreting the terms and conditions of collective bargaining agreements. The Court held this was true even though the tort action and the arbitration would involve an analysis of the same facts. In discussing why state law claims for discriminatory employment practices are not preempted the Court stated as follows:

> **"12[b] A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled. See *Baldracchi v Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F2d, at 106. Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise pre-empted would stand. Thus, as a general proposition, a state-law**

> **claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the inter-pretation of the agreement, but the separate state-law analysis would not be thereby preempted. As we said in *Allis-Chalmers Corp. v Lueck*, 471 US, at 211, 85 L. Ed. 2d 206, 105 S. Ct. 1904, 'not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is preempted by Section 301 . . . '".**

The Court of Appeal in this case essentially rejected the reasoning of *Lingle*. In doing so, it has undermined the purposes of the policies which are expressed in the Labor Management Reporting Act.

CONCLUSION

The rights of union members and employees to ensure that their unions are run democratically and honestly has been seriously undermined by the ruling in this case. This Court should grant the Petition and once again promote the policies designed by federal labor law to assure the citizens of California that their unions are run honestly and democratically.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ROBERT HANSEN and MARLA DES ERMIA, Plaintiffs and Respondents, v. AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725, et al., Defendant and Appellant.	B135132 (Super. Ct. Nos. EC022470 and EC024833)

(Filed July 20, 2001)

APPEAL from judgments of the Superior Court of Los Angeles County, Charles W. Stoll, Judge. Reversed.

Morrison & Foerster, Lisa Von Der Mehden and B. Scott Silverman for Defendant and Appellant.

Sanford L. Horn for Plaintiffs and Respondents.

Allison Beck; Van Bourg, Weinberg, Roger & Rosenfeld and David A. Rosenfeld for International Association of Machinists & Aerospace Workers as Amicus Curiae on behalf of Defendant and Appellant.

Appellant Aerospace Defense Related Industry District Lodge 725 of the International Association of Machinists and Aerospace Workers (appellant) is a subordinate unit of a labor union that represents aerospace workers.

Respondents Robert Hansen and Marla Des Ermia are two former employees of appellant who pursued wrongful termination claims against it. Their cases were consolidated prior to trial. Hansen obtained a jury verdict in the amount of $335,000 plus punitive damages of $17,782. Des Ermia was awarded $368,000 plus punitive damages in the amount of $17,782. Appellant appeals, We reverse the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Des Ermia

Des Ermia was a clerical employee in appellant's Burbank office. In January 1996, she called appellant's regional office and reported that her office manager, Barbara Powley, had made unauthorized purchases with her union credit card. Appellant's president, Calvin Duncan, reported the matter to the union office and an independent investigator was assigned to the matter. The investigator subsequently concluded that Powley had not intentionally misused the union credit card. Duncan, however, suspended Powley for 30 days without pay.[1]

Des Ermia was laid off in January 1997. The stated reason given by appellant was that the Burbank office was being closed and her position had been eliminated. Des Ermia filed this lawsuit in January 1998, alleging that she had been wrongfully terminated because of the Powley incident. She initially filed her suit in state court, alleging causes of action for violation of public policy and

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[1] The circumstances surrounding Powley's suspension shall hereinafter be referred to as "the Powley incident."

intentional infliction of emotional distress. It was removed to federal court. The United States District Judge dismissed the emotional distress claim, finding it to be preempted by the Labor Management Relations Act, 29 United States Code section 151, et seq. (LMRA), and declined to exercise supplemental jurisdiction of the public policy claim. Des Ermia's First Amended Complaint, refiled in state court on September 15, 1998, alleged only a single cause of action for violation of public policy.

Hansen

Hansen was the Business Representative for appellant. In or around February 1996, a one page leaflet was distributed to union members criticizing the way in which the Powley incident had been handled. The authors of the leaflet identified themselves only as "the Over-the-Hill Gang." Approximately one month later, another leaflet written by "the Over-the-Hill Gang" was distributed, criticizing president Duncan about union financial matters.

Hansen made comments regarding the leaflets to certain rank and file union members, essentially agreeing with the accusations made in the leaflets, but he denied writing the leaflets.

In May 1996, President Duncan terminated Hansen's employment, giving the reason that Hansen had made disparaging remarks about appellant's leadership and had attempted to undermine Duncan's authority.

Hansen filed his lawsuit on May 27, 1997, for wrongful termination in violation of public policy. The complaint was initially filed in state court, alleging causes of

action for (1) discharge in violation of public policy; (2) breach of employment agreement; (3) breach of the implied covenant of good faith and fair dealing and (4) intentional infliction of emotional distress.

The case was removed to United States District Court. The District Court judge dismissed the claims for breach of employment agreement and breach of the implied covenant of good faith and fair dealing, finding these claims were preempted by the Labor Management Reporting and Disclosure Act of 1959, 29 United States Code sections 401-531 (LMRDA). Upon remand to state court, the emotional distress claim was dismissed on summary judgment. Only the public policy cause of action proceeded to trial.

Des Ermia's case was consolidated with Hansen's for trial in October 1999.

DISCUSSION

1. *Preemption*

Appellant contends, among other things, that both Hansen's and Des Ermia's claims are preempted by federal law.

a. *Hansen*

The LMRDA guarantees to every member of a labor organization the rights of equal voting, free speech and assembly. (29 U.S.C. § 411.) It also makes it unlawful for a union to "fine, suspend, expel, or otherwise discipline" any of its members for exercising those rights (29 U.S.C.

§ 529), and allows any person whose rights have been violated to bring a lawsuit in federal district court. (29 U.S.C. § 412.) Appellant contends, therefore, that Hansen's claims against it are preempted by the LMRDA. In support of its argument for preemption, appellant relies primarily on *Finnegan v. Leu* (1982) 456 U.S. 431.

In *Finneagan, supra,* 456 U.S. 431, a union president discharged his appointed business agents. The agents filed suit, claiming a violation of the LMRDA. In holding that the LMRDA did not protect the discharged agents, the Supreme Court held that: "[T]he [LMRDA]'s overriding objective was to ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections. [Citation.] Far from being inconsistent with this purpose, the ability of an elected union president to select his own administrators is an integral part of ensuring a union administration's responsiveness to the mandate of the union election. [¶] . . . Nothing in the [LMRDA] evinces a congressional intent to alter the traditional pattern which would permit a union president under these circumstances to appoint agents of his choice to carry out his policies. [¶] . . . in enacting Title I of the [LMRDA], Congress simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff. Rather, its concerns were with promoting union democracy, and protecting the rights of union *members* from arbitrary action by the union or its officers." (*Id.* at pp. 441-442.)

In *Screen Extras Guild, Inc. v. Superior Court* (1990) 51 Cal.3d 1017, a business agent appointed by the union was

discharged and brought an action in state court against the union for wrongful discharge, defamation and negligent and intentional inflection of emotional distress. The Supreme Court held that the action was preempted by the LMRDA, stating that: "Elected union officials must necessarily rely on their appointed representatives to carry out their programs and policies. As a result, courts have recognized that the ability of elected union officials to select their own administrators is an integral part of ensuring that union administrations are responsive to the will of union members. [Citations.]" (*Id.* at pp. 1024-1025.) The Court also noted: "[W]hile the Court of Appeal through it important for the purposes of preemption analysis to distinguish between claims against a union that relate to the purposes of the LMRDA and claims that are routine disputes between an employer and employee, the reverse is actually the case. It is important *not* to base a preemption rule on such a subjective distinction. To do so would permit wrongful discharge claims against unions by business agents that would inhibit the ability of elected union officials to freely choose their staffs and would thus impermissibly frustrate full realization of the goals of the LMRDA. [Citation.]" (*Id.* at p. 1028.)

In *Sheet Metal Workers v. Lynn* (1989) 488 U.S. 347, another discharged business agent brought a lawsuit against a local union, claiming a violation of the LMRDA. The Supreme Court held that *Finnegan* did not control because the business agent was an elected, rather than an appointed official. It stated: "The consequences of the removal of an elected official are much different. To begin with, when an elected official . . . is removed from his

post, the union members are denied the representative of their choice." (*Sheet Metal Workers, supra,* at p. 355.) The agent was therefore allowed to maintain his cause of action under section 102 of the LMRDA.

Respondents argue that *Lynn,* not *Finnegan* or *Screen Extras,* controls because Hansen became a business agent pursuant to an election and was performing the same duties for which he was elected when he was discharged. This reasoning masks the true facts, however. Hansen was initially elected to the post of business agent for District 720 in 1993. In January 1994, the union was reorganized and District 720 and a few other districts were merged into District 725, the appellant in this action. Calvin Duncan became the president of the new District, and pursuant to its new by-laws, appointed Hansen as its business representative.

The stated reasons given for Hansen's termination were his poor performance, and his insubordination in criticizing the management of the District. Duncan had the right to have an appointed business agent who supported his agenda. Accordingly, Hansen's claim for wrongful discharge was preempted by the LMRDA. (*Screen Extras, supra,* 51 Cal.3d at p. 1032.)

b. *Des Ermia*

Section 301 of the Labor Management Relations Act (LMRA), 29 United States Code section 185,[2] preempts

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[2] Section 301(a) states: "Suits for violation of contracts between an employer and a labor organization representing

state law claims that are based directly on a collective bargaining agreement or are substantially dependent on an interpretation of a collective bargaining agreement. (*Wooddell v. Electrical Workers* (1991) 502 U.S. 93, 101-102; *Aguilera v. Pirelli Armstrong Tire Corp.* (9th Cir. 2000) 223 F.3d 1010, 1014.)

Des Ermia contends that her lawsuit only peripherally involves the collective bargaining agreement and therefore should not be preempted for that reason. She argues that interpretation of the collective bargaining agreement was not necessary to a [sic] resolve the dispute; the jury was not asked to analyze the contractual terms of the agreement.

Des Ermia was initially an elected officer of the union's District Lodge 727. That Lodge and others were merged to form District Lodge 725 (appellant) in January 1994 and Des Ermia lost her position. After the merger, the appellant's Office Manager offered Des Ermia work as a clerical employee. As a clerical worker for appellant, the terms and conditions of Des Ermia's employment were governed by a collective bargaining agreement (CBA) between appellant, and a local branch of the Office and Professional Employees International Union. The CBA provided that in "all cases involving . . . layoffs, seniority based on continuous service with the employer

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employees in an industry affecting commerce as defined in [the LMRA], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." (29 U.S.C. § 185, subd. (a).)

shall govern." The CBA also provided that seniority would be by regional "Area." When Des Ermia was terminated, she was told that it was due to the lack of work resulting from the closure of the Burbank office.

Des Ermia's claim is that she was terminated for pretextual reasons – that interpretation of the CBA was only necessary to determine evidence relating to motive and calculation of the proper measure of damages, citing *Lingle v. Norge Division of Magic Chef, Inc.* (1988) 486 U.S. 399. In *Lingle,* a worker who filed a workers compensation claim was terminated because the employer felt the claim was false. The worker's union filed a grievance which was sent to arbitration pursuant to the collective bargaining agreement. An arbitrator ruled in the worker's favor and ordered her reinstated. She then filed a wrongful discharge suit which was removed to federal court. The employer filed a motion to dismiss on preemption grounds. The United States Supreme Court held that although the dispute involved a factual inquiry into the conduct and motivation of the employer, it did not require the court to interpret the collective bargaining agreement and held that there was no preemption. (*Id.* at pp. 409-410.)

One of Des Ermia's main allegations was that appellant violated the CBA by laying her off before other, less senior, employees. Des Ermia argued that her "seniority date" under Article 16 of the CBA was January 1, 1994, the date which she became Secretary-Treasurer for District Lodge 727. Appellant argued that her seniority date was March 1994, the date that she became a clerical employee for the Burbank office. Des Ermia also argued

that the District violated the CBA by denying her a position in another area office, by failing to recall her after her layoff when another clerical employee quit and that she was wrongfully denied vacation and sick leave pay.

In order to find there was a pretext for laying her off, the jury necessarily had to find that she was laid off out of seniority order, or that appellant violated the provisions of the CBA. Interpretation of the CBA was therefore a prerequisite to resolution of her claim. As a result, her claim was preempted by the LMRA.

c. *Effect of District Court's Prior Ruling*

Both Hansen and Des Ermia argue that because the United States District Court only dismissed certain causes of action and remanded the remainder of each case back to state court, the remanded causes of action cannot now be deemed federal causes of action. The fact that the federal court did not retain each case at the pleading case, however, does not constitute a pronouncement that the remaining causes of action were state court causes of action. "When a federal court grants a motion for remand [to the state court], it does nothing more than determine the complaint fails, either directly or by operation of the 'artful-pleading' doctrine, to state a question arising under federal law. It does not determine whether a preemption defense can be successfully offered in state court when the entire case is considered." (*Moreau v. San Diego Transit Corp.* (1989) 210 Cal.App.3d 614, 621.)

2. *Violation of Public Policy*

Respondents contend that because their claims involve alleged violation of public policy, the preemption doctrine does not apply. With respect to Hansen, they argue that there is a substantial state interest in ensuring that employees are not discharged because they voice their opposition to management policy. In Hansen's case, however, he was employed as a business agent, and therefore was a representative of union management. It was therefore clearly within the president's rights to discharge him for voicing his contrary views.

Hansen relies on *Bloom v. General Truck Drivers* (9th Cir. 1986) 783 F.2d 1356, claiming that one of the reasons he was discharged was because he refused to conceal the facts surrounding Powley's embezzlement of union funds. This allegation was contained in his complaint; however Hansen did not establish at trial that he had reported criminal behavior or that he refused to aid and abet any criminal acts. In addition, Hansen alleged that Powley had not been bonded. However, any evidence on this issue was excluded at trial. All Hansen was able to prove at trial was that he was discharged because of his remarks criticizing Duncan's performance. For this reason, *Bloom* is inapposite.

As far as Des Ermia, the charge was that she was laid off in retaliation for her reporting that her supervisor was misusing appellant's funds. But because appellant asserted a legitimate reason for her termination, interpretation of the CBA was required. "A state's public policy, no matter how strongly reflected by its statutes, is in itself an insufficient barrier to preemption in the face

of such a necessary interpretation. [Citation.]" (*Moreau v. San Diego Transit Corp., supra,* 210 Cal.App.3d at p. 627.)

DISPOSITION

The judgments are reversed. The matter is remanded to the superior courts with instructions to dismiss the two lawsuits. (*Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 220.) The parties are to bear their own costs.

CERTIFIED FOR PUBLICATION

HASTINGS, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

ROBERT T. HANSEN, Plaintiff, vs AEROSPACE DEFENSE RELATED, INDUSTRY DISTRICT LODGE 725 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al Defendant.	EC 22470 JUDGMENT ON VERDICT (Filed June 10, 1999)

This action came on regularly for trial on May 26, 1999; in Department NCD of the Superior Court, the Honorable Charles W. Stoll Judge Presiding: the plaintiff appearing by attorneys, SANFORD L. HORN; and the defendant appearing by attorneys MORRISON & FOERSTER by: B. Scott Silverman and Lisa Von Der Mehden.

A jury of 12 persons was regularly impaneled and sworn and agreed to try the cause. Witnesses were sworn and testified. After hearing the evidence and argument of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdicts consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words as follows, to wit:

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

ROBERT T. HANSEN, Plaintiff, v. AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; CALVIN DUNCAN; BARBARA POWLEY; and DOES 1-100 inclusive, Defendants. AND CONSOLIDATED CASE	Case No. EC 022470 **SPECIAL VERDICT FORM AS TO PLAINTIFF MARLA DES ERMIA** (Filed June 10, 1999)

We, the jury in the above-entitled action, find the following Special Verdict on the questions submitted to us:

WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY: PLAINTIFF MARLA DES ERMIA

QUESTION NO. 1:

Did Plaintiff Marla Des Ermia have a reasonable and good faith belief that another employee committed theft or embezzlement against the union?

ANSWER: Yes X No _

If you answered Question No. 1 "yes," answer Question No. 2. If you answered "no," please sign, date, and return this form.

QUESTION NO. 2:

Did Marla Des Ermia responsibly report to union officials or the membership that another employee committed theft or embezzlement against the union?

ANSWER: Yes X No _

If you answered Question No. 2 "yes," answer Question No. 3. If you answered "no," please sign, date, and return this form.

QUESTION NO. 3:

Did Calvin Duncan, in making the decision to lay off Marla Des Ermia, know or believe that Ms. Des Ermia had reported that another employee committed theft or embezzlement against the union?

ANSWER: Yes X No _

If you answered Question No. 3 "yes," answer Question No. 4. If you answered "no," please sign, date, and return this form.

QUESTION NO. 4:

Was the defendant's stated legitimate reason for terminating Marla Des Ermia's employment not its true reason, but a pretext to retaliate against Ms. Des Ermia

for responsibly reporting that another employee committed theft or embezzlement against the union?

ANSWER: Yes X No _

If you answered Question No. 4 "yes," answer Question No. 5. If you answered "no," please sign, date, and return this form.

QUESTION NO. 5:

Did District Lodge 725's conduct in terminating Ms. Des Ermia's employment cause her damages?

ANSWER: Yes X No _

If you answered Question No. 5 "yes," answer Question No. 6. If you answered "no," please sign, date, and return this form.

QUESTION NO. 6:

If you are answering this question, you have found District Lodge 725 liable for wrongful termination in violation of public policy as to Marla Des Ermia. Taking into account Ms. Des Ermia's obligation to make reasonable efforts to find comparable employment, what is the total amount of economic and non-economic damages, if any, caused by District Lodge 725 in terminating Ms. Des Ermia's employment?

ANSWER: (a) Economic $ 68,000.00
(b) Non-economic $ 300,000.00

QUESTION NO. 7:

Did Plaintiff Marla Des Ermia prove by clear and convincing evidence that District Lodge 725, by the conduct of an officer, director, or managing agent, acted with oppression or malice towards her in terminating her employment?

ANSWER: Yes X No _

Sign, date, and return this verdict form.

Dated: 6/10/99

/s/ David E. Rush
Signature of Jury Foreperson

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

ROBERT T. HANSEN, Plaintiff, v. AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; CALVIN DUNCAN; BARBARA POWLEY; and DOES 1-100 inclusive, Defendants.	Case No. EC 022470 **SPECIAL VERDICT FORM AS TO PLAINTIFF ROBERT HANSEN** (Filed June 10, 1999)
AND CONSOLIDATED CASE	

We, the jury in the above-entitled action, find the following Special Verdict on the questions submitted to us:

WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY: PLAINTIFF ROBERT HANSEN

QUESTION NO. 1:

Did Plaintiff Robert Hansen have a reasonable and good faith belief that another employee committed theft or embezzlement against the union?

ANSWER: Yes X No _

If you answered Question No. 1 "yes," answer Question No. 2. If you answered "no," please sign, date, and return this form.

QUESTION NO. 2:

Did Robert Hansen responsibly report to union officials or the membership that another employee committed theft or embezzlement against the union?

ANSWER: Yes X No _

If you answered Question No. 2 "yes," answer Question No. 3. If you answered "no," please sign, date, and return this form.

QUESTION NO. 3:

Did Calvin Duncan, in making the decision to terminate Plaintiff Robert Hansen's employment, know or believe that Mr. Hansen had reported that another employee committed theft or embezzlement against the union?

ANSWER: Yes X No _

If you answered Question No. 3 "yes," answer Question No. 4. If you answered "no," please sign, date, and return this form.

QUESTION NO. 4:

Was the defendant's stated legitimate reason for terminating Robert Hansen's employment not its true reason, but a pretext to retaliate against Mr. Hansen for

responsibly reporting that another employee committed theft or embezzlement against the union?

ANSWER: Yes X No _

If you answered Question No. 4 "yes," answer Question No. 5. If you answered "no," please sign, date, and return this form.

QUESTION NO. 5:

Did District Lodge 725's conduct in terminating Mr. Hansen cause him damages?

ANSWER: Yes X No _

If you answered Question No. 5 "yes," answer Question No. 6. If you answered "no," please sign, date, and return this form.

QUESTION NO. 6:

If you are answering this question, you have found District Lodge 725 liable for wrongful termination in violation of public policy as to Robert Hansen. Taking into account Mr. Hansen's obligation to mitigate his damages, what is the total amount of economic and non-economic damages, if any, caused by District Lodge 725 in terminating Mr. Hansen's employment?

ANSWER: (a) Economic $ 185,000.00
(b) Non-economic $ 150,000.00

QUESTION NO. 7:

Did Plaintiff Robert Hansen prove by clear and convincing evidence that District Lodge 725, by the conduct of an officer, director, or managing agent, acted with oppression or malice towards her in terminating her employment?

ANSWER: Yes X No _

Sign, date, and return this verdict form.

Dated: 6/10/99

/s/ David E. Rush
Signature of Jury Foreperson

It appearing by reason of said verdict that plaintiff, Robert T. Hansen, is entitled to judgment against Defendant, Aerospace Defense Related Industry District Lodge 725 of the International Association of Machinists and Aerospace Workers.

Now, therefore, it is ordered adjudged and decreed that plaintiff, Robert T. Hansen, shall have and recover by way of his Complaint against defendant, Aerospace Defense Related Industry District Lodge 725 of the International Association of Machinists and Aerospace Workers the sum of $185,000.00 as Economic damages and $150,000.00 as Non-economic damages plus $17,782.00 as Punitive damages for a total of $352,782.00 and further, plaintiff, Robert T. Hansen, is entitled to recover costs and disbursements amounting to the sum of $ 7,712.56

It appearing by reason of said verdict that plaintiff, Marla Des Ermia, is entitled to judgment against Defendant, Aerospace Defense Related Industry District Lodge 725 of

the International Association of Machinists and Aerospace Workers.

Now, therefore, it is ordered adjudged and decreed that plaintiff, Marla Des Ermia, shall have and recover by way of his [sic] Complaint against defendant, Aerospace Defense Related Industry District Lodge 725 of the International Association of Machinists and Aerospace Workers the sum of $68,000.00 as Economic damages and $300,000.00 as Non-economic damages plus $17,782.00 as Punitive damages for a total of $385,782.00 and further, plaintiff, Marla Des Ermia, is entitled to recover costs and disbursements amounting to the sum of $_____

Dated: 6-10-99 /s/ Charles W. Stoll
CHARLES W. STOLL
SUPERIOR COURT JUDGE

Court of Appeal, Second Appellate District,
Division Four – No. B135132
S100223

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Oct. 31, 2001)

MARLA DES ERMIA et al., Plaintiffs and Respondents,

v.

AEROSPACE DEFENSE RELATED INDUSTRY
DISTRICT LODGE 725,
Defendant and Appellant.

Petition for review DENIED.

/s/ GEORGE
Chief Justice

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29 U.S.C. § 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have

jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, [sic] or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

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29 U.S.C. § 401. Congressional declaration of findings, purposes, and policy

(a) Standards for labor-management relations

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose

their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) Protection of rights of employees and the public

The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further/and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) Necessity to eliminate or prevent improper practices

The Congress, therefore, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and

their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended [29 U.S.C.A. § 141 et seq.], and the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.], and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

29 U.S.C. § 524. Effect on State laws

Nothing in this chapter shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ROBERT T. HANSEN, Plaintiff, vs. AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Defendants.	CASE NO. EC 022470 NOTICE OF ENTRY OF JUDGMENT (Filed June 15, 1999)
AND CONSOLIDATED CASE	

TO AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725, etc., et al., defendants, and to their attorney of record:

NOTICE IS HEREBY GIVEN that on June 10, 1999, judgment was entered in the above-entitled action in favor of plaintiffs ROBERT T. HANSEN and MARLA DES

ERMIA against AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS.

Dated: June 14, 1999

LAW OFFICES OF
SANFORD L. HORN

by /s/ Sanford L. Horn
SANFORD L. HORN
Attorney for Plaintiffs

Supreme Court, U.S.
FILED
APR 22 2002
CLERK

No. 01-1386

In The

Supreme Court of the United States

ROBERT HANSEN AND MARLA DES ERMIA,

Petitioners,

v.

AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the California Court of Appeal correctly rule that the facts of the Hansen case fell within this Court's decision in *Finnegan v. Leu*, which protects the right of an elected union president to fire an appointed business representative who disagrees with the union leadership?

2. Did the California Court of Appeal correctly rule that it was necessary for the jury to interpret the collective bargaining agreement in order to resolve Des Ermia's state law wrongful termination claim, thereby preempting it under section 301 of the LMRA, where the employer asserted as a defense that it had laid her off in accordance with the collective bargaining agreement?

LIST OF PARTIES

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

The respondent, District Lodge 725, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the California Court of Appeal's decision in this case. The petition states no grounds that require or justify review by this Court. Petitioners' statements of the issues misstate the factual circumstances of their claims.[1] By this error, petitioners demonstrate that their dispute with the Court of Appeal's decision is largely based on factual arguments.

Review of the Court of Appeal's Opinion is also unnecessary either to secure uniformity of decision or to settle any important question of law. Plaintiffs' sweeping assertion, that the decision of the Court of Appeal "forecloses the possibility of an employee who is employed by a labor union from ever prosecuting an action against his or her employer on the basis that the termination was in violation of the public policy of the state of California" (Pet. at 11), is a vast overstatement of the effect and the nature of the Court of Appeal Decision. In finding the petitioners' claims preempted under two different branches of federal labor law, the Court of Appeal applied well-established decisions of this Court and the California Supreme Court. The Court of Appeal simply

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[1] The decision of the California Court of Appeal contains a succinct and accurate rendition of the facts of the two consolidated cases. (*See* App. at 2-4.) Respondent incorporates the Statement of Facts contained therein.

observed that petitioners' claims, as tried to the jury, factually came within these preemption doctrines.

REASONS FOR DENYING THE WRIT

A. Petitioners Seek Review Of Factual Conclusions

1. With Respect to Petitioner Hansen, Neither the Decision Below Nor the Record Raises the Question Presented in the Petition

In their question presented with respect to petitioner Hansen, petitioners ask the Court to consider a factually incorrect question. They ask the Court to resolve whether a claim of wrongful discharge in violation of public policy by "an elected union official who is discharged by the union for exposing union corruption to the union membership" is preempted by federal law governing union democracy. As the Court of Appeal observed, however, Hansen was not discharged for exposing union corruption: "Hansen did not establish at trial that he had reported criminal behavior or that he refused to aid and abet any criminal acts." (App. at 11.) "All Hansen was able to prove at trial was that he was discharged because of his remarks criticizing [the union president's] performance." (App. at 11.) Hansen's dispute is not with the law, but with the Court of Appeal's factual conclusions concerning the nature of his discharge from employment.

Petitioner Hansen also appears to dispute the Court of Appeal's factual conclusion regarding the basis upon which his claim was preempted by the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C.

§ 401, *et seq.* ("LMRDA"), namely, that he was an appointed and not an elected business agent. Petitioners assert that Mr. Hansen was not an appointed union official but was elected. (Pet. at 3, 14.) The Court of Appeal rejected this argument because petitioners' assertion was factually wrong. While Hansen had been an elected business agent with his prior employer, District 720, that District had ceased to exist when it was merged, along with a number of other Districts, into District 725. District 725 was governed by a new set of by-laws which provided that business agents, like Hansen, were appointed. (App. at 7.)

2. Like Petitioner Hansen, Petitioner Des Ermia Seeks Review of the California Court of Appeal's Factual Conclusions

Like petitioner Hansen, petitioner Des Ermia seeks this Court's review of the appellate decision entirely on a factual basis. Petitioners do not challenge the well-established decisions of this Court and other federal courts that a person employed pursuant to a collective bargaining agreement may not pursue a state law claim for wrongful discharge in violation of public policy, or any other state law theory, if resolution of that claim is substantially dependent on the interpretation of a collective bargaining agreement. *E.g., Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988); *Wooddell v. International Bhd. of Elec. Workers, Local 71*, 502 U.S. 93, 101-02 (1991); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985); *Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010, 1014 (9th Cir. 2000). Rather, petitioner Des Ermia's actual issue is with the Court of Appeal's conclusion that it was necessary to

interpret the collective bargaining agreement governing her employment in order to resolve her claim in this case.

As with the issues raised with respect to petitioner Hansen's claim, this is purely a factual inquiry. Resolution of these factual conclusions will not affect anyone other than the present litigants, and provides no basis or justification for review by this Court.

B. The Court of Appeal Correctly Applied Well-Established Federal And State Law in Determining that Hansen's Claim Was Preempted

As noted above, petitioners' question presented with respect to Mr. Hansen's claim is wrong. The correct question is: Does federal law protect the right of an elected union president to fire an appointed business representative who criticizes his boss to the union membership? The California Court of Appeal correctly held that Hansen's claim that he was wrongfully terminated in violation of public policy for comments made to union members critical of his elected boss was preempted under the LMRDA. In doing so, the court applied well-established law stemming from this Court's ruling in *Finnegan v. Leu*, 456 U.S. 431 (1982) and by the California Supreme Court's decision in *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017, 275 Cal. Rptr. 395, 800 P.2d 873 (1990).

In *Finnegan v. Leu*, the petitioners were appointed business agents who had campaigned for the incumbent president in a union election. After the new president won the election, he promptly fired the business agents, explaining that their continued employment would undermine his ability to implement the chosen programs

and procedures of his new administration. *Id.* at 433. The business agents brought suit under the LMRDA, alleging wrongful termination. *Id.* at 434.

This Court held that the business agents failed to state a claim under the LMRDA. In doing so, this Court acknowledged that the LMRDA protects the freedom of elected union officials "to choose a staff whose views are compatible with their own" and that hiring and firing union staff members is an "integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Finnegan v. Leu*, 456 U.S. 431, 440-41. The holding was based on the notion that the newly elected president's victory might be rendered meaningless if disloyal staff were able to thwart the implementation of his programs. This Court noted that in enacting the LMRDA, Congress "simply was not concerned with perpetuating appointed union employees in office at the expense of an elected president's freedom to choose his own staff. Rather, its concerns were with promoting union democracy, and protecting the rights of union members from arbitrary action by the union or its officers." *Id.* at 442.

In *Screen Extras Guild, Inc. v. Superior Court*, 51 Cal. 3d 1017, 1021 (1990), the California Supreme Court held that the *Finnegan* ruling and the federal policy favoring union democracy underlying *Finnegan* preempts state law claims for "wrongful discharge or related torts" brought by discharged management or policy-making union employees against their union employer. The California Supreme Court reasoned that to allow such claims "would inhibit the ability of elected union officials to freely choose their staffs and would thus impermissibly

frustrate full realization of the goals of the LMRDA [citation]." *Id.* at 1028.

Other state and federal courts have followed the California Supreme Court's ruling in *Screen Extras Guild*, uniformly holding that *Finnegan* preempts state law wrongful discharge suits brought by appointed union employees. *Dzwonar v. Robert McDevitt & Local*, 791 A.2d 1020 (N.J. 2002) (*Finnegan* requires preemption with respect to discharge of union employees with policy-making responsibilities); *Montoya v. Local Union III of I.B.E.W.*, 755 P.2d 1221 (Colo. App. 1988) (*Finnegan* requires preemption of business agent's wrongful termination claims, except to the extent the *Bloom* exception applies); *Casumpang v. ILWU, Local 142*, 94 Haw. 330, 342 (Haw. 2000) (acknowledging *Finnegan* preemption, but finding doctrine inapplicable to an elected business agent asserting a pure assumpsit claim); *Young v. International Bhd. of Locomotive Eng'rs*, 114 Ohio App. 3d 499 (Ohio App. 1996) (acknowledging *Finnegan* preemption in *dicta*); *Agen v. Teamsters Joint Council No. 2*, 617 F. Supp. 81, 82-83 (D. Mont. 1985) (same).

To avoid the holdings of *Finnegan* and *Screen Extras Guild*, petitioners rely on the Ninth Circuit's decision in *Bloom v. General Truck Drivers, etc., Local 952*, 783 F.2d 1356 (9th Cir. 1986). In *Bloom*, a business agent sued his former union employer, alleging that he had been fired for refusing to falsify minutes of an executive board meeting which authorized the expenditure of funds. *Id.* at 1358. The Ninth Circuit recognized an exception to the preemption principles in *Finnegan* and *Screen Extras Guild* in the *Bloom* case because the business agent had been discharged for refusal to commit a crime. *Id.* at 1362.

Petitioners attempt to bring Hansen's case within the *Bloom* holding by factually misrepresenting the conduct that led to his termination. They argue that he was discharged for "exposing" a criminal violation. As the Court of Appeal noted, however, the plaintiff in *Bloom*, who was allowed to proceed with his cause of action for wrongful discharge in violation of public policy, had alleged that he was terminated for refusing to commit a crime which would have led to the cover-up of embezzlement by another union official. In contrast, Hansen "did not establish at trial that he had reported criminal behavior or that he refused to aid and abet any criminal acts." (App. at 11.) As the Court of Appeal further noted, "[a]ll Hansen was able to prove at trial was that he was discharged because of his remarks criticizing [the union president's] performance." Under *Screen Extras Guild*, "[i]t was therefore clearly within the president's rights to discharge him for voicing his contrary views." (App. at 11.)

Hansen also tries to suggest that the *Bloom* case stands for the proposition that claims of wrongful discharge in violation of public policy in general are not preempted by the LMRDA. *Bloom* is not so broad. It deals with a narrow situation of an employee who claimed he was fired for refusing to commit an actual crime, whereas Hansen was fired not for refusing to commit a crime but for griping about his boss to fellow union members. The policy of the LMRDA which this Court recognized in *Finnegan v. Leu* is that the interest of an elected union official in having loyal appointed subordinates requires preemption of state law claims. Only, as in *Bloom*, where that policy would otherwise lead to sanctioning criminal conduct has a court recognized an exception.

C. The Court of Appeal Correctly Applied Well-Established Federal Law in Determining that Des Ermia's Claim Was Preempted

As with Hansen, petitioner Des Ermia's quarrel with the Court of Appeal's conclusion is largely factual. She does not dispute the settled law that a state law claim, including one for wrongful discharge in violation of public policy, is preempted if its resolution requires interpretation of a collective bargaining agreement.

The law governing section 301 preemption is well-established, and applies to tort and contract claims alike as long as the claim "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 402, 403, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). Numerous other decisions, from federal and state courts throughout the land, establish this point. *See, e.g., Aguilera v. Pirelli Armstrong Tire Corp.*, 223 F.3d 1010 (9th Cir. 2000) (fraud claim preempted because it required interpretation of CBA); *Moreau v. San Diego Transit Corp.*, 210 Cal. App. 3d 614, 258 Cal. Rptr. 647 (1989) (public policy discharge and emotional distress claims preempted); *Friday v. Hughes Aircraft Co.*, 188 Cal. App. 3d 117, 236 Cal. Rptr. 291 (1986) (public policy discharge and emotional distress claims preempted); *Doran v. Thermatex Corp.*, 1989 U.S. Dist. LEXIS 16312 (N.D. Ohio 1989) (claim for retaliatory termination preempted); *Baker v. Farmers Elec. Coop.*, 34 F.3d 274, 280 (5th Cir. 1994) (emotional distress claim preempted); *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1037 (6th Cir. 1989) (fraud and misrepresentation claim

preempted); *Lydon v. Boston Sand & Gravel Co.*, 15 F. Supp. 2d 150 (D.Mass. 1998) (claim for violation of a workers' compensation statute preempted).

Significantly, it does not matter whether the issue of interpreting a collective bargaining agreement is raised by the plaintiff in her claim, or by the employer as a defense. As the Court in *Lingle* recognized, construction of a bargaining agreement may be just as much at issue in the refutation of a claim as in its prosecution. *Lingle*, 486 U.S. at 407.

Here, petitioner Des Ermia's claim presents a classic case of section 301 preemption. The Court of Appeal found for several reasons that the jury was required to interpret the collective bargaining agreement in order to resolve her claim. First, the court found that interpretation of the collective bargaining agreement was necessary to resolution of Des Ermia's claim because, "[i]n order to find there was a pretext for laying her off the jury necessarily had to find that she was laid off out of seniority order, or that appellant violated the provisions of the CBA." (App. at 10.)

Petitioners argue that the Court of Appeal misapplied the preemption doctrine because the issue of interpretation of the collective bargaining agreement was raised by the employer as a defense and the employer's interpretation was found to be false by a jury. (Pet. at 12.) The Court of Appeal rejected this very argument, however, citing *Moreau v. San Diego Transit Corp.*, 210 Cal. App. 3d 614, 621 (1989), for the proposition that where the employer's defense necessarily requires the jury to interpret the collective bargaining agreement, preemption

still applies no matter how strong the public policy involved. (App. 11-12.)

This was precisely the issue in the Des Ermia case below. Des Ermia's state law claim involved allegations that the employer's actions were motivated by an intent to retaliate against her for reporting criminal activity. The resolution of that issue turned on the legitimacy of the employer's non-discriminatory reason for terminating Ms. Des Ermia, namely, a layoff in order of seniority in conformance with the collective bargaining agreement. The fact that the jury may have found that the employer did not conform with the collective bargaining agreement does not avoid preemption. To the contrary, it demonstrates the need for preemption. Uniformity of interpretation of collective bargaining agreements requires that such issues be decided not by juries, but through the grievance and arbitration process under federal law. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

The necessity for the jury to interpret the collective bargaining agreement arose not only because the employer asserted as a defense that it had laid Des Ermia off in accordance with the agreement, but also because petitioners argued to the jury that respondent's violation of the agreement in various ways was evidence of respondent's retaliatory motive. As the Court of Appeal noted, one of the most hotly debated issues at trial was Des Ermia's proper seniority date under the collective bargaining agreement. "One of Des Ermia's main allegations was that [respondent] violated the CBA by laying her off before other, less senior, employees . . . . Des Ermia also argued that the District violated the CBA by denying her a position in another area office, by failing to recall her

after her layoff when another clerical employee quit and that she was wrongfully denied vacation and sick leave pay." (App. at 9-10.) Thus, even under Des Ermia's theory of the case, the jury had to interpret the collective bargaining agreement in reaching its verdict.

CONCLUSION

The Petition for Writ should be denied because there are no issues meriting the Court's attention.

Respectfully submitted,

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Supreme Court, U.S.
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No. 01-1386

In The

Supreme Court of the United States

ROBERT T. HANSEN and MARLA DES ERMIA,

Petitioners,

v.

AEROSPACE DEFENSE RELATED INDUSTRY DISTRICT LODGE 725 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of California County Of Los Angeles

REPLY TO BRIEF IN OPPOSITION

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THE QUESTION PRESENTED IN THE PETITION IS FACTUALLY CORRECT

Respondent's Brief in Opposition to the Petition for Writ of Certiorari contends that the question presented by the Petition is not whether a cause of action for wrongful termination in violation of public policy by an elected union official who is discharged for exposing union corruption to the membership is preempted by the federal statutes governing union democracy. Respondent contends that the facts of the case do not raise this issue. In support of this contention Respondent cites excerpts from the Court of Appeals' decision to justify its position. In doing so Respondent ignores the specific fact-finding role of the jury in this case.

The jury in this case was given specific interrogatories and made unanimous findings of fact. The jury specifically found that Hansen responsibly reported the theft of union funds to the membership; that his employer was aware of this report; and that Hansen's discharge was made in retaliation for the report he made concerning the theft of union funds. (See questions numbers 2, 3, and 4 of the special verdict form at Appendix 19 and 20).

There was also no factual dispute at the trial that Hansen was elected as a business representative by the union membership for a four year term and his employment was terminated well before the passage of four years. The union's argument was that the creation of a new entity by reason of a merger of districts within the union permitted the union to treat Hansen as an at-will employee after the creation of the new entity but prior to the expiration of Hansen's four year elected term. This

raises a sub-issue as to whether the union hierarchy has the right to nullify the will of the membership's democratic choice of its leaders by simply changing the various organizational units within the union.

In any event the question raised by this Petition is clear. Do the federal statutes governing the rules of union democracy permit the discharge of a union employee because he refuses to remain silent and speaks out about corruption within the union hierarchy? The holding of the Court of Appeal in this case provides an incongruous answer, that is, that such statutes allow the union hierarchy to retaliate against honest union employees who refuse to remain silent and help cover up corruption within the union. It is hard to see how this furthers the principle of democracy within labor unions.

The Respondent's Brief in Opposition also asserts that Des Ermia's Petition raises largely factual issues. This is not correct. As was the case with Hansen, the jury through its special verdict unanimously found that Des Ermia was discharged for responsibly reporting the theft of union funds and that her employer's assertion that she was laid off for lack of work was false. (See the special verdict form as to Des Ermia, questions numbers 2, 3 and 4 at Appendix 15 and 16) There is no finding that the collective bargaining agreement was breached. No such question was ever presented to the jury. Nor did the trial court present any instructions whatsoever to the jury concerning a breach of an employment agreement. The facts and the issues that were presented to the jury revolved around what motivated Des Ermia's dismissal.

The jury was not required to interpret the collective bargaining agreement in order to resolve the issues in this case.

The issue raised by Des Ermia's claim implicates the policy underlying the federal labor statutes that seek uniformity in the interpretation of collective bargaining agreements. Her claim also implicates the statutory scheme designed to promote union democracy and to combat corruption within labor unions. A rule which deters union employees from exposing corruption within a labor union hinders and does not promote union democracy. The Court of Appeal in this case held that no matter what policy is implicated and no matter how important that policy is once an employer asserts a defense based on the collective bargaining agreement, even though that defense is false, all other considerations must fail.

This policy has sometimes found favor in the Circuit Courts of Appeal as well. A prime example of this is illustrated in *Sprewell v. National Basketball Association*, 231 F.3d 520 (9th Cir. 2000). In this case the Court originally held that a claim of racial discrimination and other wrongful conduct must fail and is preempted once an employer asserts a defense based on its view of the collective bargaining agreement. Later the Court withdrew its opinion and recognized that merely raising the claim by an employer that there is a need to interpret or refer to a collective bargaining agreement will not automatically cause the Court to hold a state law cause of action is preempted without a careful analysis of the policies underlying that state cause of action. See *Sprewell*

v. National Basketball Association, 266 F.3d 979 (9th Cir. 2001).

The Ninth Circuit also recently struggled with this same issue in *Cramer v. Consolidated Freightways, Inc.,* 255 F.3d 683 (9th Cir. 2001). In this case the Court, *en banc,* upheld a cause of action under state law for invasion of privacy was not preempted by reason of the employers' assertion of a defense based on its interpretation of the collective bargaining agreement. The employer in this case had installed video cameras in restrooms used by employees for the ostensible purpose of combating drug usage. Although the Court made a detailed analysis of how one could resolve this case without actually interpreting the collective bargaining agreement it is clear that the Court was attempting to reach a balance between the public policy inherent in the right to privacy and the need for uniformity in the interpretation of collective bargaining agreements.

In the case of Des Ermia, to the extent there is a claim that the policy of uniformity in interpretation of collective bargaining agreements is implicated, there is also a policy of promoting democracy and freedom from corruption in labor unions that is also implicated. The Court should grant the Petition here in order to resolve the question of balancing between potentially competing public policies as they relate to the need for uniformity in the interpretation of collective bargaining agreements.

Respectfully submitted,

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